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FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER.

$$\frac{1}{2}, \frac{1}{3}, \frac{1}{4}, \frac{1}{5}, \frac{1}{6}, \frac{1}{7}, \frac{1}{8}, \frac{1}{9}, \frac{1}{10}, \frac{1}{11}, \frac{1}{12}, \frac{1}{13}, \frac{1}{14}, \frac{1}{15}, \frac{1}{16}, \frac{1}{17}, \frac{1}{18}, \frac{1}{19}, \frac{1}{20}$$

Therefore a hearing on the matter was held February 3, 1977, in the High School Library of School District #28, Saint Ignatius, Montana. The Federation was represented by Mr. Joseph W. Duffy

1 of the law firm of McKittrick and Duffy, Great Falls, Montana.
2 Mr. Edward K. Duckworth, Deputy Lake County Attorney, Polson,
3 Montana, represented the School Board.

4 As the duly appointed hearing examiner of the Board of
5 Personnel Appeals, I conducted the hearing in accordance with
6 the provisions of the Montana Administrative Procedure Act
7 (Section 82-4201 to 82-4225, R.C.M. 1947).

8 RULINGS ON MOTIONS UNDER ADVISEMENT

9 Complainant's Motion to Amend Petition, made at the hearing
10 and argued in Complainant's Post Hearing Brief, based on Section
11 24-3.8(6)-S855 of the Rules and Regulations of the Board of
12 Personnel Appeals, and not contested by Defendant, is hereby
13 granted.

14 Defendant's Motion for Continuance is hereby denied,
15 Defendant having proceeded on the substance for the additional
16 unfair labor practice alleged and the hearing examiner consider-
17 ing the record adequate to address the charge.

18 FINDINGS OF FACT

19 After a thorough review of the entire record of this case,
20 including sworn testimony, evidence, and briefs, I make the
21 following findings:

22 CHARGE AS STATED IN COMPLAINANT'S REPLY
23 TO ORDER FOR MORE DEFINITE STATEMENT:

24 That prior to November 4, 1976, the Board of Trustees
25 had insisted during negotiations that the employees
26 accede to a salary index (specifically the Montana
27 Employees Association [sic] Index #4) which has no
28 relationship to these employees, is, in fact, a
29 salary index applicable to another Union and which
30 constituted an unreasonable attempt by the Board of
31 Trustees to impose conditions upon this bargaining
32 unit which constituted interference and restraint
of these employees' collective bargaining rights
and constituted failure to bargain in good faith.

1. The School Board's salary offers were generally
based on MEA Attainment Level 4. (Fisher, Erickson)

2. According to testimony, the School Board generally based

1 its salary offers on MEA Attainment Level 4 because:

2 a. It desired to create a more equitable salary schedule.

3 The following testimony of Mr. Mike Fisher, chairman of the
4 School Board and its chief negotiator, given under direct
5 examination as an adverse witness, is explanatory:

6 Mr. Duffy: I recall your answer to my question
7 about why you utilized this schedule, the Montana
8 Education Association, is that it was your desire
9 to create a more equitable salary schedule. Is that
10 correct?

11 Mr. Fisher: Yes.

12 Mr. Duffy: Could you state for me and for the
13 record what you mean by a more equitable salary
14 schedule?

15 Mr. Fisher: I'm talking about the increments
16 that the teachers earn in their years of experience
17 or as they advance in the education areas.... On
18 the 75-76 salary schedule, for example, a teacher
19 who is at a B.A., after he's here a year, when he
20 goes to two years experience, his increment on this
21 schedule may have been \$450 at this point. Then
22 the next year, from the second to the third year,
23 his increment may have been \$110. And then the
24 third year to the fourth year his increment again
25 may have been \$450. To the Board and to the negotiators
26 this was not, we felt that this was not an equitable
27 salary schedule for all staff. In fact, on that
28 salary schedule a teacher who finished his fifth
29 year of, or who was at a fifth year and if he
30 completed his Masters he would in fact lose \$7.

31 (tape 316)

32 b. It desired to maintain competitive base salaries to
attract good, qualified teachers into the system without
raising the salaries of the more experienced and educated
teachers so high that the schedule would not be affordable
by the school district. (Fisher)

3. The Federation's salary proposals were generally based
on across the board percentage increases over the 1975-1976
salary schedule. (Fisher, Erickson)

4. According to testimony, the Federation desired an across
the board percentage increase because:

a. This was the desire of the teachers, whose guidelines

1 were pursued by their negotiating team at the table.

2 b. It desired to maintain buying power.

3 c. It considered an across the board percentage
4 increase more equitable than the School Board's
5 proposal under which some teachers would have received
6 higher increases than others.

7 d. It believed that teachers should have some input
8 into decisions relating to the distribution of the
9 total dollar amount. (Erickson)

10 5. According to testimony, the Federation was opposed to a
11 salary schedule based on an MEA Attainment Level because:

12 a. The Federation was not affiliated with the MEA
13 and didn't believe an MEA Attainment Level should be
14 applied to it.

15 b. The teachers were not on a salary schedule based
16 on an attainment level and did not wish to be.

17 c. The Federation's negotiators did not have information
18 about attainment levels at their disposal. (Erickson)

19 6. The following contract history is relevant:

20 a. The salary schedule for the 1974-75 contract
21 between the School Board and the Federation was
22 based on MEA Attainment Level 5. (Erickson)

23 b. During negotiations for the 1975-76 contract
24 between the School Board and the Federation, the
25 School Board had wanted to go from MEA Attainment
26 Level 5 to MEA Attainment Level 4. A compromise
27 salary schedule off an attainment level which provided
28 for percentage increases over the previous year's
29 salaries was finally agreed to. (Erickson, Fisher)

30 7. The following aspects of negotiations between the
31 School Board and the Federation for the 1976-77 contract were
32

1 significant:

2 a. In March or April, 1976, the Federation indicated
3 it would agree to a salary schedule based on MEA
4 Attainment Level 5. (Erickson)

5 b. The fact finder's report, which was accepted by the
6 School Board and rejected by the Federation, recommended
7 a salary schedule "... structured relatively close to
8 attainment level 4 and 1/4" (Complainant's Exhibit
9 A, Fisher)

10 c. In October or November, 1976, a two year package was
11 proposed by the Federation which was based on a combina-
12 tion of MEA Attainment Levels - "one year was one thing
13 and another year was a different thing" (tape 878)
14 (Erickson). Mr. Ron Erickson, spokesman for the Federa-
15 tion's negotiating team, didn't recall if both years were
16 based on MEA Attainment Levels. Mr. Fisher, testified
17 that the Federation would have accepted MEA Attainment
18 Level 4 for the first year as long as the second year
19 salary schedule was based on MEA Attainment Level 5.

20 d. The contract finally agreed to by the parties
21 contained a salary schedule not based on a MEA Attainment
22 Level. (Fisher)

23 CHARGE AS STATED IN COMPLAINANT'S REPLY
24 TO ORDER FOR MORE DEFINITE STATEMENT:

25 That on and after November 4, 1976, the employer
26 gave these employees an ultimatum that they must
27 accept the foregoing MEA Salary Index as a condition
28 of employment and also refused to discuss the
issue of retroactive pay in the collective bargaining
sessions until after said employees had agreed to
the unilateral demand.

29 8. At the November 4, 1976, negotiating session the School
30 Board made a salary proposal and said that that was the last
31 offer the School Board intended to make which would be retro-
32 active to the beginning of the school year. (Fisher, Erickson)

1 9. The School Board, believing the matter of retroactive
2 pay to be negotiable, was concerned about the increasing cost
3 of retroactive pay involved and "after eleven months negotiating
4 ... needed something to bargain with...." (tape 1576) (Fisher)

5 10. The Federation felt it had been threatened by this
6 statement of the School Board; that if it did not agree to
7 this offer of the School Board any other schedule at any other
8 time would not be retroactive. (Erickson)

9 11. The Federation considered this issue of retroactivity
10 to be a negotiable item. (Erickson)

11 12. The issue of retroactivity "had come up earlier, but
12 in a different context and under different circumstances...."
13 (tape 844) (Erickson)

14 13. In negotiating sessions held subsequent to November 4,
15 1976, no salary proposal was made by the School Board which did
16 not include retroactive pay. (Fisher)

17 14. The final settlement included retroactive pay. (Fisher)

18 CHARGE AS STATED IN COMPLAINANT'S CHARGE
19 AGAINST EMPLOYER (THE SCHOOL BOARD):

20 That during May, 1976, the employer by its officers,
21 agents or representatives attempted to interfere
22 with employees in the exercise of the rights
23 guaranteed in Section 59-1603, R.C.M., 1947, by
24 questioning and meeting with individual teachers
25 on an individual basis concerning matters that
26 were in the process of being negotiated by and
27 between the union and the employer....

28 CHARGE AS STATED IN COMPLAINANT'S REPLY TO
29 ORDER FOR MORE DEFINITE STATEMENT:

30 ... a teacher named Myrna Vandenburg was questioned
31 by members of the Board of Trustees during the month
32 of April, 1976. Specifically, she was questioned by
the Chairman of the Board, Mike Fisher, about the
negotiations that had taken place. The exact date
during the month of April is unknown at this time
to the Complainant, as is the exact location of the
conversations.

33 CHARGE AS STATED IN COMPLAINANT'S POST
34 HEARING BRIEF:

35 ... that during negotiations the employer on at least
one occasion attempted to undermine the Union's position
by discussing the negotiations with individual teachers,

1 thereby bypassing the Union's role as collective
2 bargaining agent for these employees. In this
3 respect, these discussions with individual
4 employees (Myrna Vanderburg, for example) were
5 conducted in an atmosphere which created consider-
6 able anxiety on the individual employee's part.

7 15. In April (Vanderburg) or May (Fisher) of 1976,
8 Ms. Vanderburg, a teacher at Saint Ignatius, entered the district
9 office to get hot water for tea. (Vanderburg, Bailey)

10 16. Mr. Fisher was in the district office working on
11 salary schedules with Ms. Peterson, the district clerk, when
12 Ms. Vanderburg entered the room. (Fisher, Bailey, Peterson)

13 17. A conversation regarding salary schedules ensued.

14 a. Ms. Vanderburg testified that Mr. Fisher handed
15 her a piece of paper that was a School Board offer
16 on MEA Attainment Level 4 and asked her if she'd
17 seen it and what she thought of it. Mr. Fisher,
18 Ms. Peterson, and Ms. Bailey, (the school's business
19 manager), the only other people present, testified
20 that they didn't recall Mr. Fisher handing a slip of
21 paper to Ms. Vanderburg, that they only recalled
22 Ms. Vanderburg joining in the ensuing conversation.

23 b. Ms. Vanderburg testified that while she
24 "couldn't really tell... whether they [Mr. Fisher,
25 Ms. Peterson, and/or Ms. Bailey] were exactly [trying
26 to persuade her] to their point of view" (tape 1069),
27 she felt in a position to defend the teachers' negotiators,
28 uncomfortable, intimidated, like she was being
29 interrogated, and like she "wanted out of there"
30 (tape 1077).

31 c. Mr. Fisher testified that there was no heated
32 exchange, that if Ms. Vanderburg felt uncomfortable
in the situation she didn't show it, and that he would
find it difficult to believe that Ms. Vanderburg would

1 feel intimidated or coerced by him because they're
2 close friends.

3 d. Ms. Bailey testified that Ms. Vanderburg did
4 not appear to feel intimidated; that she recalls
5 nothing unpleasant about the conversation; that
6 Ms. Vanderburg's participation in the conversation
7 was voluntary; that Ms. Vanderburg was free to leave
8 at any time; that there was no attempt to interrogate,
9 coerce, interfere with, or restrain Ms. Vanderburg.

10 e. Ms. Peterson testified that there was no
11 interrogation, coercion, interference, or restraint;
12 that Ms. Vanderburg's participation in the conversa-
13 tion was voluntary; but that Ms. Vanderburg was
14 "getting a little uptight" (tape 1533) during the
15 conversation.

16 CHARGE AS STATED IN COMPLAINANT'S POST
17 HEARING BRIEF:

18 The employer on more than one occasion made offers
19 which were either not meant to be taken seriously
20 by the Union or were withdrawn while the Union was
considering them or after the Union had accepted
them.

21 18. At a negotiating session in May, 1976, a discussion
22 of a salary schedule not on an attainment level was initiated
23 by the School Board. (Erickson)

24 19. In the ensuing discussion of this salary schedule,
25 the Federation's negotiators asked (a) for time to consider the
26 salary schedule, (b) to take the salary schedule back to the
27 teachers, a request denied by the School Board, and (c) whether
28 this was an official offer, to which the School Board answered
29 "no". (second side of tape 019) (Erickson)

30 20. In the summation portion of the May 6, 1976, negotia-
31 tion session minutes it was stated that the salary schedule in
32 question was not a formal proposal of the School Board. This

1 was established by the following testimony:

2 Mr. Erickson: ... the salary schedule was placed
3 on the table and was discussed as an offer and it
4 was listed in the summation as an offer from the
Board.

5 Mr. Duckworth: Would you like to read the minutes,
Mr. Erickson?

6 Mr. Erickson: I would like to review that section.

7 Mr. Duckworth: It does say that it was allowed to
8 be entered... and it was not a formal proposal?

9 Mr. Erickson: That's what it says at that point,
yes.

10 (Second side of tape, 030)

11 21. In September, 1976, the Federation decided it could
12 accept the salary schedule in question as a compromise schedule.
13 (Erickson)

14 22. The School Board refused to accede to the Federation's
15 acceptance of the salary schedule at that time. (Erickson)

16 23. The salary schedule in question related "quite
17 closely" (second side of tape 008) to the salary schedule
18 finally settled on. (Erickson)

19 CHARGE AS STATED IN COMPLAINANT'S POST
20 HEARING BRIEF:

21 ...while the employer was meeting with the Union
22 during these sessions, the employer representatives
23 did not have sufficient authority to advance
proposals, to accept proposals, and more importantly,
to bind the employer to agreements reached at the
collective bargaining table.

24 24. This charge was based on the following testimony:

25 Mr. Duffy: Now, does the entire Board negotiate?

26 Mr. Fisher: No.

27 Mr. Duffy: And do you delegate certain individuals
28 on the Board to do the negotiating?

29 Mr. Fisher: Yes, we do.

30 Mr. Duffy: Are they usually the same people all the
time?

31 Mr. Fisher: No.
32

1 Mr. Duffy: So a certain number of the Board shows
2 up at each bargaining session?

3 Mr. Fisher: No, I thought you meant year after
4 year.

5 Mr. Duffy: No, I mean the contract.

6 Mr. Fisher: Yes, they are.

7 Mr. Duffy: There's five members on the Board.
8 How many do you usually send to negotiations.

9 Mr. Fisher: Two.

10 Mr. Duffy: Two. I would assume that actions of the
11 Board require Board approval - what, at a majority?

12 Mr. Fisher: Yes.

13 Mr. Duffy: So the two people you send in to negotiate
14 are not in a position to enter into a contract until
15 it's agreed to by the Board?

16 Mr. Fisher: I believe that's the same way the teachers
17 operate, I believe.

18 Mr. Duffy: Well, that's not response to my question.
19 The teachers can speak for the way that they handle it
20 themselves. I'm asking the School Board's position.
21 You send two people, but those two people are not in
22 a position to bind the Board?

23 Mr. Fisher: No. (tape 243)

24 Mr. Duffy: All five members appeared before the fact
25 finder, didn't they?

26 Mr. Fisher: Yes.

27 Mr. Duffy: They would have been able to arrive at
28 a decision, would they not have, all five of them
29 being present?

30 Mr. Fisher: No.

31 Mr. Duffy: Why not?

32 Mr. Fisher: Because we cannot take action unless
we're at a Board meeting.

Mr. Duffy: So whoever shows up at a negotiating
session, since it is not a Board meeting, is not
empowered to take any action?

Mr. Fisher: No. (tape 574)

DISCUSSION

In determining whether or not the School Board's bargaining
posture regarding MEA Attainment Level 4 constituted an unfair
labor practice, the following factors were considered:

1 1. Section 59-1605(3), R.C.M. 1947, clearly states
2 that the obligation to negotiate in good faith does
3 not compel either party to agree to a proposal or
4 require the making of a concession.

5 2. The School Board's position was neither arbitrary
6 nor capricious, reasonable arguments having been
7 presented in support of its position.

8 3. That a salary schedule based on a MEA Attainment
9 Level was considered inherently objectionable and
10 inapplicable by the Federation because it was derived
11 from another union was refuted by the evidence that
12 in these negotiations the Federation had itself
13 advanced a salary proposal based on a MEA Attainment
14 Level.

15 At the November 4, 1976, negotiating session the School
16 Board indicated that a salary proposal was the last offer it
17 intended to make which would be retroactive to the beginning
18 of the school year. In determining whether or not this con-
19 stituted an unfair labor practice, the following factors were
20 considered:

21 1. Both parties considered the issue of retroactivity
22 to be negotiable.

23 2. This was not the first time retroactivity had
24 been discussed.

25 3. No subsequent salary proposal was advanced by the
26 School Board which did not involve retroactive pay,
27 and the final settlement in these negotiations provided
28 for retroactive pay. (Note that the allegation in
29 this matter was "that on and after November 4, 1976....").

30 In determining whether or not the discussion between Mr.
31 Fisher and Ms. Vanderburg constituted an unfair labor practice,
32 the following factors were considered:

1 1. The incident was precipitated totally by
2 happenstance; it was in no way a planned, prepared
3 for, or formal discussion.

4 2. The incident was, as far as the record indicates,
5 totally isolated, neither recurring with this
6 employee nor happening at any time to any other
7 employee; thereby disallowing any allegation of a
8 continuous, concerted activity of the School Board.

9 3. The incident was trivial in nature, particular
10 details of the occurrence not being remembered by any
11 of the participants.

12 In determining whether or not the School Board committed
13 an unfair labor practice when it initiated a discussion of
14 a salary schedule but did not formally present it as an offer,
15 the following factors were considered:

16 1. It was emphasized at the negotiating session at
17 which the discussion took place that it was not a
18 salary proposal.

19 2. Several months elapsed between the time the
20 discussion took place (May) and the time the
21 Federation decided to accept the "offer" (September).
22 There was no evidence on record that there was any
23 discussion of the salary schedule in question in
24 the interim. That the color of negotiations had
25 changed considerably in the interim was assumed.

26 In determining whether or not the School Board's negotiators
27 had sufficient authority to advance proposals, to accept
28 proposals, and to bind the School Board to agreements reached
29 at the collective bargaining table, the following factors were
30 considered:

31 1. There was no evidence on record that at any time
32 the School Board's negotiators lacked sufficient

1 authority to engage in meaningful negotiations.

2 2. The above withstanding, that testimony on
3 which the charge was based was interpreted as
4 being that of a layman using a term of art with
5 which he was not totally familiar.

6 CONCLUSIONS OF LAW

7 The allegations contained in ULP #33-76, charging that the
8 Board of Trustees of School District #28, Saint Ignatius,
9 Montana violated Section 59-1605(1)(a) and (e), R.C.M. 1947,
10 have not been sustained by the Complainant.

11 RECOMMENDED ORDER

12 The charges referred to in ULP #33-76, filed on September
13 30, 1976, by the Mission Federation of Teachers, Local #3182,
14 AFT, AFL-CIO, against the Board of Trustees of School District
15 #28, Saint Ignatius, Montana are hereby dismissed.

16 NOTICE

17 Exceptions may be filed to these Findings of Fact,
18 Conclusions of Law, and Recommended Order within twenty days
19 service thereof. If no exceptions are filed with the Board of
20 Personnel Appeals within that period of time, the Recommended
21 Order shall become a Final Order. Exceptions shall be addressed
22 to the Board of Personnel Appeals, 1417 Helena Avenue, Helena,
23 Montana 59601.

24 DATED this 10th day of June, 1977.

25
26 BOARD OF PERSONNEL APPEALS

27
28 BY Kathryn Walker
29 Kathryn Walker
30 Hearing Examiner
31
32

1 CERTIFICATE OF MAILING

2 * * * * *

3 I, Vonda Brewster, hereby certify and state that I did on
4 the 10th day of June, 1977, to the following people at their
5 last known address:

6
7 Mr. Edward K. Duckworth
8 County Attorney's Office
9 Lake County Courthouse
10 Polson, MT 59860

11 Mr. Mike Fisher
12 Chairman
13 Board of Trustees
14 School District #28
15 St. Ignatius, MT 59865

16 Mr. Joseph W. Duffy
17 Attorney at Law
18 315 Davidson Building
19 Great Falls, MT 59401

20 Mission Federation of Teachers
21 Local #3182, AFT, AFL-CIO
22 St. Ignatius, MT 59865

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VONDA BREWSTER